Comintel Sdn Bhd v U Television Sdn Bhd (previously known as U Telecom Media Holdings Sdn Bhd and MITV Corp Sdn Bhd) & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-325-07 OF 2018
MOHD NAZLAN J
4 SEPTEMBER 2018

Companies and Corporations — Winding up — Injunction to restrain petition — Application for injunction by plaintiff to refrain presentation of winding up petition — Fortuna injunction — Review application by plaintiff in Federal Court — Whether statutory demand premature — Whether it caused irreparable damage to the plaintiff — Whether issues raised by plaintiff caught by res judicata — Companies Act 2016 ss 465(1) & 466

The plaintiff was appointed by the first defendant to provide technical consultancy and system redesign solutions with a view to resolving the technical problems that the first defendant was encountering with its network broadcast system for a total contract price of RM115,042,749.83 ('the project'). The first defendant had paid a total sum of RM20,833,053.13 to the plaintiff for services rendered and equipment delivered. The plaintiff and the first defendant then got embroiled into a dispute. This arose from disagreements concerning a proof of concept site acceptance test, which resulted in the plaintiff commencing a suit against the first defendant for breach of a letter of award. However, the first defendant contended that the plaintiff was the one in breach of the proof of concept, and filed a counterclaim for return of the RM20,833,053.13. The dispute turned litigious. The High Court allowed the plaintiff's claim in part and dismissed the first defendant's counterclaim. This was then affirmed by the Court of Appeal. The Federal Court however on 18 August 2017 subsequently reversed the decisions of the High Court and the Court of Appeal, allowed the first defendant's counterclaim and ordered the return of RM20,833,053.13 to the first defendant, together with interest at 8%pa and costs. The plaintiff then sought clarification from the Federal Court in relation to the assessment of the value of services and equipment supplied by the plaintiff to the first defendant respecting the project and in relation to the issue of interest. The Federal Court provided clarification on interest. Dissatisfied with the decision, the plaintiff commenced a review application to the Federal Court and at the same time filed the application in the instant originating summons dated 2 July 2018 in encl 1 for a Fortuna injunction to among others restrain the defendants from presenting a winding up petition on a statutory demand dated 12 June 2018

issued under ss 465 and 466 of the Companies Act 2016 ('the CA'). In essence, the thrust of the plaintiff's application for a Fortuna injunction was twofold. First was the argument that since it had filed a review application at the Federal Court to review the apex court's own decision reversing those of the Court of Appeal and the High Court, the sum demanded by the defendants in their winding up notice as per the statutory demand was bona fide disputed. Secondly, the plaintiff submitted that the defendants had prematurely issued the statutory demand, given its assertion of the right of set off against the first defendant. It was the defendant's stance that the issues sought by the plaintiff were caught by res judicata and that in any event the demand of the defendants was predicated on a judgment debt which could no longer be argued to be bona fide disputed.

Held, dismissing originating summons with costs:

(1) When there was a judgment debt, like presently, the claim for the debt could not be stated to be disputed (let alone bona fide disputed). And an application for a Fortuna injunction could not validly succeed on the basis of either of the two categories. It was certainly not in dispute that even the highest court in the land, the Federal Court, has made its decision for the defendants, by allowing their appeals. On this basis alone, given the presence of a judgment debt, the court found it difficult to conclude other than stating that the instant application for a Fortuna injunction must fail (see paras 29 & 31–32).

(2) An application for a Fortuna injunction cannot be the appropriate forum for a determination of the merits of the plaintiff's motion to review the Federal Court decision. The review application did not amount to a bona fide dispute of the judgment debt, in view of the Federal Court decision which was at present a valid, binding and enforceable order. It is after all trite law that orders and judgments of the court must be treated with respect and require strict obedience, until and unless set aside. Thus, this line of argument of the plaintiff was without merit. The court, more so a winding up court, cannot go behind a valid judgment of the court, except in cases of fraud or illegality, which was not the contention of the plaintiff (see paras 37–39).

(3) The argument of the plaintiff that the plaintiff was entitled to set off the value of the missing and non-functioning items from the sum claimed by the defendants could not hold water. The plaintiff could not just make the assertions without more, and without having them grounded in averments in the affidavits in support. As such, the absence of the plaintiff actually commencing any such claim of set off aside, neither had the plaintiff actually evinced an intention to do so under oath. The assertions of the plaintiff's concerning collection of equipment were at best

irrelevant if not wholly bereft of basis. This was nowhere close to any form of a bona fide dispute over the debt being claimed by the defendants (see paras 54 & 58).

(4) Res judicata would be in relation to the very issue of dispute between the parties — on the arguments pertaining to the counterclaim — which had been raised before in the motion for clarification, and now repeated in the motion for review. There was no necessity to rely the wider sense of res judicata as referred to by the leading Federal Court decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. The law would not permit the issue of arguments on counterclaim to be re-opened and re-litigated by the plaintiff in the review application at the Federal Court when the same had been raised in the plaintiff's own affidavit in support in the preceding motion for clarification at the Federal Court. Res judicata would step in to prevent a further re-agitation of the same complaints which had been raised before the apex court, which was now attempted to be raised by the plaintiff in its conduct of litigation in instalments (see paras 63–64).

(5) As the winding up petition could not be said to be incapable of success given the judgment over the debt, the issue on irreparable damage became irrelevant. Further, the proper determination of the matter that ought to be determined in a different, more suitable alternative procedure forum because the winding up court procedure might produce irreparable damage to the company, was only applicable if the matter was disputed. If there was a judgment debt like in the present case, there was really no dispute (see paras 67–68).

(6) The crucial point was that the applicant for Fortuna injunction must at present have the ability to pay the amount claimed by the defendant to be due and owing to the defendant, and manifestly fell within the definition of 'unable to pay its debts' pursuant to s 466 of the CA. The test of commercial solvency required immediate availability of assets to pay current liabilities when they fall due. In the instant case, the plaintiff did not even furnish any audited financial statements nor was there any basis to show whether the plaintiff had immediate availability of assets to pay the statutory demand (see paras 74–75 & 78).

[Bahasa Malaysia summary

Plaintif telah dilantik oleh defendan pertama untuk membekalkan konsultan teknikal dan penyelesaian sistem reka bentuk semula dengan pandangan untuk menyelesaikan masalah-masalah teknikal yang dihadapi oleh defendan pertama dengan sistem siaran rangkaian untuk jumlah keseluruhan kontrak RM115,042,749.83 ('projek tersebut'). Defendan pertama telah membayar sejumlah RM20,833,053.13 kepada plaintif untuk perkhidmatan-perkhidmatan yang diberikan dan peralatan-peralatan yang

telah dihantar. Plaintif dan defendan pertama kemudiannya terbabit dalam pertelingkahan. Ini berbangkit daripada ketidaksetujuan berkenaan dengan ujian penerimaan bukti konsep tapak, yang menyebabkan plaintif memulakan saman terhadap defendan pertama untuk perlanggaran surat penganugerahan. Walau bagaimanapun, defendan pertama menyatakan bahawa plaintif yang melanggar bukti konsep, dan memfailkan tuntutan balas untuk pemulangan RM20,833,053.13. Pertelingkahan bertukar dengan saman-menyaman. Mahkamah Tinggi membenarkan tuntutan plaintif dalam bahagian dan menolak tuntutan balas defendan pertama. Ini kemudiannya ditegaskan oleh Mahkamah Rayuan. Mahkamah Persekutuan walau bagaimanapun, pada 18 Ogos 2017 kemudiannya menukar keputusan-keputusan Mahkamah Tinggi dan Mahkamah Rayuan, membenarkan tuntutan balas defendan pertama dan memerintahkan untuk pemulangan RM20,833,053.13 kepada defendan pertama, bersama dengan faedah 8% setiap tahun dengan kos-kos. Plaintif kemudiannya meminta penjelasan daripada Mahkamah Persekutuan berkaitan dengan penilaian nilai perkhidmatan-perkidmatan dan peralatan-peralatan yang dibekalkan oleh plaintif kepada defendan pertama menghormati projek dan berkaitan dengan isu faedah. Mahkamah Persekutuan memberikan klarifikasi atas faedah. Tidak berpuas hati dengan keputusan, plaintif memulakan permohonan semakan kepada Mahkamah Persekutuan dan pada masa yang sama memfailkan permohonan untuk saman pemula ini bertarikh 2 Julai 2018 dalam encl 1 untuk Injunksi Fortuna untuk antara lainnya, menahan defendan-defendan daripada mengemukakan petisyen penggulungan atas tuntutan statutori 12 Jun 2018 yang dikeluarkan di bawah ss 465 dan 466 Akta Syarikat 2016 ('AS'). Secara ringkasnya, asas permohonan injuksi Fortuna plaintif mempunyai dua perkara. Pertama adalah hujahan bahawa memandangkan ia telah memfailkan permohonan semakan di Mahkamah Persekutuan untuk menyemak keputusan mahkamah agung dalam menukar keputusan Mahkamah Rayuan dan Mahkamah Tinggi, jumlah yang dituntut oleh defendan-defendan di dalam notis penggulungan sebagaimana di dalam tuntutan statutori adalah bona fide dipertelingkahkan. Keduanya, plaintif menghujahkan bahawa defendan-defendan telah mengeluarkan tuntutan statutori pra-matang, memberikan hak untuk menolaknya terhadap defendan pertama. Ia adalah pendirian defendan bahawa isu-isu yang dituntut oleh plaintif tertakluk kepada res judicata dan bahawa jikalau tuntutan defendan-defendan diisytiharkan atas hutang kehakiman yang mana tidak boleh lagi dihujahkan sebagai pertelingkahan bona fide.

Keputusan, menolak saman pemula dengan kos:

(1) Apabila terdapatnya hutang penghakiman, seperti sekarang, tuntutan hutang tidak boleh dinyatakan sebagai dipertelingkahkan (malahan pula pertelingkahan bona fide). Dan permohonan untuk injuksi Fortuna tidak boleh secara sahnya berjaya atas asas di antara kedua-dua kategori. Ia adalah pastinya tidak ditelingkahkan sedangkan mahkamah tertinggi

di tanah ini, Mahkamah Persekutuan, telah membuat keputusan untuk defendan-defendan, dengan membenarkan rayuan-rayuan. Atas dasar ini sahaja, memandangkan kewujudan hutang penghakiman, mahkamah menemukan bahawa ia adalah susah untuk menyimpulkan selain daripada menyatakan bahawa permohonan injuksi Fortuna ini mestilah gagal (lihat perenggan 29 & 31–32).

(2) Permohonan injunksi Fortuna tidak boleh menjadi forum yang sesuai untuk memutuskan merit-merit atas usul plaintif untuk menyemak keputusan Mahkamah Persekutuan. Permohonan penyemakan tidak menjadi pertelingkahan bona fide atas hutang penghakiman, dalam pandangan Mahkamah Persekutuan yang mana kini adalah perintah yang sah, berpegang dan boleh dilaksanakan. Lagipun ia adalah undang-undang yang mantap bahawa perintah-perintah dan penghakiman-penghakiman mestilah dipatuhi dengan hormat dan memerlukan pematuhan yang tegas, sehingga dan jikalau telah diketepikan. Oleh itu, jalur hujahan plaintif adalah tanpa merit. Mahkamah ini, apa lagi mahkamah penggulungan, tidak boleh mengingkari penghakiman sah mahkamah, kecuali di dalam kes-kes penipuan dan haram, yang mana bukanlah penyataan plaintif (lihat perenggan 37–39).

(3) Hujahan plaintif bahawa plaintif layak menolak jumlah barang yang hilang dan tidak berfungsi daripada jumlah yang dituntut oleh defendan-defendan tidak boleh ditegaskan. Plaintif tidak boleh sewenang-wenangnya membuat penyataan tanpa lebih, dan tanpa menyatakannya asasnya di dalam afidavit sokongan. Oleh itu, ketiadaan plaintif dalam memulakan apa-apa tuntutan penolakan, tidak juga plaintif menyatakan niatnya untuk membuat yang sama di bawah sumpah. Penyataan-penyataan plaintif berkaitan dengan koleksi peralatan adalah tidak relevan dan tidak mempunyai sebarang asas. Ini tidak langsung rapat dengan apa-apa bentuk pertelingkahan bona fide terhadap hutang yang telah dituntut oleh defendan-defendan (lihat perenggan 54 & 58).

(4) Res judicata akan menjadi tidak relevan berkaitan dengan isu pertelingkahan antara pihak-pihak atas perbalahan-perbalahan mengenai tuntutan balas yang telah dibangkitkan sebelum ini dalam usul untuk klarifikasi, dan kini diulangi di dalam usul untuk semakan. Tidak terdapat keperluan untuk bersandar kepada pertimbangan lebih luas res judicata sepertimana yang dirujuk oleh Mahkamah Persekutuan di dalam di *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. Undang-undang tidak membenarkan isu perbalahan-perbalahan atas tuntutan balas dibuka semula dan dilitigasikan semula oleh plaintif di dalam permohonan semakan di Mahkamah Persekutuan apabila yang sama telah dibangkitkan di dalam

afidavit sokongan plaintif sendiri dalam usul seterusnya untuk klarifikasi di Mahkamah Persekutuan. Res judicata akan timbul untuk mencegah pergaduhan lanjut atas aduan-aduan yang sama yang mana telah dibangkitkan sebelum mahkamah agung, yang mana kini cuba untuk dibangkitkan oleh plaintif dalam tindakan litigasi secara berperingkat (lihat perenggan 63–64).

(5) Memandangkan petisyen penggulungan tidak boleh dikatakan boleh berjaya atas sebab penghakiman ke atas hutang, isu berkenaan kerugian yang tidak boleh diperbetulkan menjadi tidak relevan. Selanjutnya, pemutusan yang wajar untuk perkara yang mana patut diputuskan di dalam forum prosedur alternatif yang berbeza dan lebih sesuai kerana prosedur mahkamah penggulungan akan menghasilkan kerugian yang tidak dapat diperbetulkan kepada syarikat, terpakai jika perkara dipertelingkahkan. Jikalau ada hutang penghakiman di dalam kes kini, tiada langsung pergaduhan (lihat perenggan 67–68).

(6) Titik penting adalah permohonan untuk injunksi Fortuna mestilah sekarang berkeupayaan untuk membayar jumlah yang dituntut oleh defendan untuk menjadi tertunggak dan terhutang kepada defendan, dan secara langsungnya jatuh dalam definisi 'tidak boleh membayar hutang-hutangnya' menurut kepada s 466 AS. Ujian solven komersil memerlukan keberadaan aset-aset untuk membayar libailiti-liabiliti terkini secara serta-merta apabila ia perlu dibayar. Di dalam kes ini, plaintif tidak pun memberikan penyataan-penyataan kewangan yang telah diaudit atau ada asas untuk menunjukkan bahawa plaintif mendapat keberadaan aset-aset untuk membayar tuntutan statutori (lihat perenggan 74–75 & 78).]

Notes

For cases on injunction to restrain petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1570–1592.

Cases referred to

Aeon Big (M) Sdn Bhd v SSM Management Sdn Bhd [2017] MLJU 1824; [2017] 8 AMR 732, HC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (not folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878; [2016] 10 CLJ 247, HC (distd)

Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation [1978] VR 83, SC (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 8 CLJ 775, CA (refd)

A *Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd* [2018] 9 MLJ 305, HC (refd)
Kris Heavy Engineering & Construction Sdn Bhd v Lewis & Co (Advocates & Solicitors) [2017] MLJU 906; [2017] 5 AMR 866, HC (refd)
Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ
B 817, CA (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)
Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, PC (refd)
C
Malpac Holdings Bhd v Malpac Capital Sdn Bhd & Ors [2017] MLJU 1257; [2017] 1 LNS 1251, HC (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA (refd)
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316;
D [2007] 3 CLJ 295, CA (refd)
Multimedia Development Corp Sdn Bhd v Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653, HC (distd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
E
Sanjung Suria Sdn Bhd v PLB-KH Bina Sdn Bhd [2014] 7 MLJ 1, HC (refd)
Sri Hartamas Development Sdn Bhd v Mbf Finance Bhd [1992] 1 MLJ 313; [1992] 1 CLJ 637, SC (refd)
System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd [1999] MLJU 55; [1999] 1 AMR 1187, HC (refd)
F
Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355, CA (refd)
Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain), Re [2000] 6 MLJ 155, HC (refd)
G *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 218
H Companies Act 2016 ss 465, 465(1)(e), 466

JL Foo (ML Tan with him) (Gan Partnership) for the plaintiff.
Clinton Tan Kian Seng (Thomas Philip) for the defendants.

Mohd Nazlan J:

I

INTRODUCTION

[1] This is an application for an injunction filed by the plaintiff to restrain the defendants from presenting a winding up petition under s 465 of the

Companies Act 2016 against the plaintiff. A

[2] At the conclusion of the hearing, I refused the application and highlighted the main reasons for the dismissal. This judgment contains the full reasons for my decision, which affirms the principles governing applications of Fortuna injunctions under the new Companies Act 2016. B

KEY BACKGROUND FACTS

[3] The plaintiff was appointed by the first defendant to provide technical consultancy and system redesign solutions with a view to resolving the technical problems that the first defendant was encountering with its network broadcast system for a total contract price of RM115,042,749.83 ('the project'). C

[4] The first defendant had paid a total sum of RM20,833,053.13 to the plaintiff for services rendered and equipment delivered. D

[5] The plaintiff and the first defendant then got embroiled into a dispute. This arose from disagreements concerning a proof of concept site acceptance test, which resulted in the plaintiff commencing a suit against the first defendant for breach of a letter of award. However, the first defendant contended that the plaintiff was the one in breach of the proof of concept, and filed a counterclaim for the return of the RM20,833,053.13. E

[6] The dispute turned litigious. First, the High Court allowed the plaintiff's claim in part and dismissed the first defendant's counterclaim. This was then affirmed by the Court of Appeal. F

[7] The Federal Court however on 18 August 2017 subsequently reversed the decisions of the High Court and Court of Appeal, allowed the first defendant's counterclaim and ordered the return of the RM20,833,053.13 to the first defendant, together with interest at 8% pa, and costs. G

[8] The plaintiff then sought a clarification from the Federal Court in relation to the assessment of the value of services and equipment supplied by the plaintiff to the first defendant respecting the project and in relation to the issue of interest. The Federal Court provided clarification on interest. H

[9] Further dissatisfied, the plaintiff commenced a review application to the Federal Court and at the same time filed the application in the instant originating summons dated 2 July 2018 in encl 1 for a Fortuna injunction to among others restrain the defendants from presenting a winding up petition on a statutory demand dated 12 June 2018 issued under ss 465 and 466 of the I

A Companies Act 2016 ('the CA').

[10] Hence the instant application before me.

SUMMARY OF CONTENTIONS OF PARTIES

B

[11] In essence the thrust of the plaintiff's application for a Fortuna injunction is twofold.

C **[12]** First is the argument that since it has filed a review application at the Federal Court to review the apex court's own decision reversing those of the Court of Appeal and the High Court, the sum demanded by the defendants in their winding up notice as per the statutory demand is bona fide disputed.

D **[13]** Secondly, the plaintiff submitted that the defendants had prematurely issued the statutory demand, given its assertion of the right of set off against the first defendant. This, so says the plaintiff, is an abuse of process of the court, and has caused irreparable damage to the plaintiff.

E **[14]** The defendants' opposition to the Fortuna injunction application is on the other hand based on the stance taken by the defendants that the issues sought to be raised by the plaintiff are caught by res judicata, and that in any event the demand of the defendants is predicated on a judgment debt which can no longer be argued to be bona fide disputed.

F

[15] Before I evaluate the case of the parties, I should first state the law on Fortuna injunction, albeit in summary fashion. This appears next.

THE LAW ON FORTUNA INJUNCTION — A SUMMARY

G

[16] An injunction designed to prevent the filing of a winding up petition is known as a Fortuna injunction. The jurisprudential basis of the applicability of Fortuna injunctions in this country is well-established. It in part may be traced to the eponymous Australian case of *Fortuna Holdings Pty Ltd v Deputy Federal* H *Commissioner of Taxation* [1978] VR 83, a decision of the Supreme Court of Victoria.

[17] The decision in *Fortuna Holdings* has established the important rule that an injunction would only be granted in circumstances where to allow the I petition would be an abuse of process as the petition has no chance of success. And that the plaintiff would have to show that the petition, if presented, would likely be dismissed.

[18] The court will thus have to be satisfied that there is a bona fide dispute

of the debt demanded in the winding up notice which precedes the petition intended to be restrained, based on substantial grounds. The same principles were adopted and applied by our Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, where Gopal Sri Ram JCA (later FCJ) summarised the position with trademark lucidity in the following manner:

> (3) The kind injunction by which an intended winding up petition is sought to be restrained is known as 'Fortuna injunction'. The phrase takes its name from *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* where the juridical basis for the relief was first explained. *Fortuna Holdings* made it clear that the courts have established a principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. It was also clear that two distinct branches emanate from the principle — of which the first applies in cases where the presentation of the petition may produce irreparable damage to the company and where the proposed petition has no chance of success, and the second in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

[19] In a subsequent decision, the Court of Appeal again had the occasion to consider the application of a Fortuna injunction, where in the case of *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947, Ramly Ali JCA (now FCJ) provided the following explanation:

> [25] An application for an injunction to restrain an intended winding-up petition against a company is known as a 'Fortuna Injunction', taking its name from the case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding up petition and the two principles that guide courts in the grant of an injunction to that effect (see also: *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeal).
>
> [26] The first principle laid down in that case is that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie:
>
> (i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and
>
> (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.
>
> (See: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940; and *Bryanston Finance Ltd v De Vries (No 2)* [1976] 2 WLR 41; [1976] 1 All ER 25).

A [27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, B cannot be granted by court under this principle.

[28] The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

C [29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this D point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[20] The Court of Appeal in *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355 further explained that the court exercises its inherent E jurisdiction when issuing such an injunction to restrain the presentation of a winding up in order to prevent an abuse of process. The test when granting the injunction is whether there is bona fide dispute of the debt. Gopal Sri Ram JCA (later FCJ) held:

[8] When deciding whether to grant an injunction to restrain a petition that is based F on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds (see *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 does not apply.

G

[21] Accordingly, given the foregoing authorities and other relevant judicial pronouncements, it is now settled law that the courts may grant a Fortuna injunction to prevent the presentation of a winding up petition on the basis of either the petition has no chance of success and might produce irreparable H damage to the company, or that an assertion of a disputed claim is made in the petition by way of a procedure that might produce irreparable damage. The courts must be satisfied that the plaintiff has established a prima facie case of an abuse of process by the presentation of a petition particularly on the basis of a disputed debt; and the serious question to be tried test established in *American* I *Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 is not applicable.

[22] I should perhaps mention that case law authorities on Fortuna injunction in this country are largely premised on the winding up provisions in the former s 218 of the Companies Act 1965. The Companies Act 1965 has

since been replaced by the Companies Act 2016.

[23] However, as I have highlighted in *Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd* [2018] 9 MLJ 305, these statutory provisions are repeated and drafted in almost virtually identical fashion in ss 465 and 466 of the new Companies Act 2016. As such, the jurisprudence and authorities, a number of which have been and will be highlighted herein, would continue to be of direct relevance and be applicable to like effect, vis a vis the situations which are subject to the corresponding provisions in the Companies Act 2016.

EVALUATION AND FINDINGS OF THIS COURT

No bona fide dispute if there is judgment debt

[24] As correctly asserted by the plaintiff there are two key instances where a Fortuna injunction will be given to stem the threat of a winding up petition, both of which are considered to be abuses of process. As I have stated earlier, the Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 held that these are first, where a winding petition is bound to fail, and secondly, where the dispute ought to be determined in another forum.

[25] The plaintiff thus argues that its application for a Fortuna injunction is premised on the second situation. For clarity, it is useful to again refer to this second principle as articulated in *Mobikom Sdn Bhd,* as follows:

> The second branch applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some cases both the first and the second branches of the principle apply.

[26] The logic behind this assertion of the plaintiff is quite simple. This category applies to the plaintiff's situation because the defendants are asserting a claim, which basis is at present pending a decision of the Federal Court in an application to review its decision.

[27] This contention of the plaintiff is however wholly misconceived. It has misconstrued the law on the relationship between the two categories justifying the grant of a Fortuna injunction as explained by settled authorities. The crux of the matter is this. An intended petition would stand a good chance success and is not bound to fail if the debt in question is based on a judgment of the court. It is not disputed.

[28] I have recently dealt with this issue in *Klass Corp (M) Sdn Bhd* in the

following terms:

> [26] In the first place, it is settled law that a judgment debt is not considered as capable of having the status of being disputed. Whatever dispute that existed has been resolved by the judgment of the court. This much is clear from the decision of the Court of Appeal in the case of *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 referred to earlier, which is worthy of repetition, as follows:
>
> > [27] This principle is not applicable to the present case. *The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed.* Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.
>
> [27] This is the position because the court has already made the determination, in the form of a valid and enforceable judgment, which confirms the existence of the debt. It can thus no longer be disputed, unless the judgment is otherwise stayed or set aside. Again, *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 states:
>
> > [29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. *A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point.* Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle. (Emphasis added.)
>
> [28] In the instant case before me however, the status of the judgment debt is one that is presently valid, binding and enforceable. There is no stay against the judgment of the sessions court. The plaintiff did not even apply for a stay.

[29] It is thus very plain that when there is a judgment debt, like presently, the claim for the debt cannot be stated to be disputed (let alone bona fide disputed). And an application for a Fortuna injunction cannot validly succeed on the basis of either of the two categories, as made crystal clear in the above passages from the judgment of the Court of Appeal in *Muniammah Muniandy.*

[30] The plaintiff's reference to my decision in *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247 where the application for a Fortuna injunction was successfully established given the presence of a disputed claim is, in my view unmeritorious. In that case, there was no judgment debt.

[31] However, that is definitely not the situation in the instant case. It is certainly not in dispute that even the highest court in the land, the Federal Court, has made its decision for the defendants, by allowing their appeals.

[32] On this basis alone, given the presence of a judgment debt, I find it difficult to conclude other than stating that the instant application for a Fortuna injunction must fail.

There is no stay order against judgment debt

[33] Neither can the plaintiff find true support in another case it refers to in its submission, namely the High Court decision in *Sanjung Suria Sdn Bhd v PLB-KH Bina Sdn Bhd* [2014] 7 MLJ 1. And the reason why reliance on *Sanjung Suria* by the plaintiff is futile is obvious when one reads the very passage highlighted by the plaintiff in its written submissions, as follows:

> [56] As I have mentioned earlier, with the stay order in place, the judgment is for all intents and purposes in a state of suspended animation. It is obvious enough that the stay order essentially seeks to maintain the status quo vis a vis the assets of SSSB whereas PKBSB, with its avowed intention of winding up SSSB seeks to change the status quo. In any event, whether that is PKBSB's intention or not, any winding up of SSSB will definitely change the status quo of SSSB. In this regard, it is apposite to bear in mind that there is an appeal pending against the very judgment that formed the basis of the 218 notice.

[34] It will be readily observed that the case stands for the proposition that when a decision is subject to a stay order, it cannot be said to be free from being bona fide disputed. In contradistinction, there is no stay in the judgment debt in the case before me. There is no indication that the plaintiff had even applied for one.

Winding up courts do not go behind judgment

[35] The review application filed at the Federal Court is intended primarily to make a case of a failure of natural justice. The plaintiff argues that the Federal Court had allowed the first defendant's counterclaim, which is the very basis of the defendants' winding up notice in the statutory demand, without hearing parties arguing on the merits of the counterclaim at the hearing of the appeal proper.

[36] The plaintiff also disputed the finding of the Federal Court that there had been a total failure of consideration given that the plaintiff did supply equipment and render services to the first defendant.

[37] In other words, the plaintiff is contending that it had a bona fide dispute against the debt demanded by reason that it has filed a motion to review the Federal Court decision and that its collection of equipment from the first defendant being relevant to the judgement debt in question.

[38] In my view, an application for a Fortuna injunction cannot be the appropriate forum for a determination of the merits of the plaintiff's motion to review the Federal Court decision. The review application does not amount to a bona fide dispute of the judgment debt, in view of the Federal Court decision which is at present a valid, binding and enforceable order. It is after all trite law that orders and judgments of the court must be treated with respect and require strict obedience, until and unless set aside (see, for example, the Supreme Court decision in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217).

[39] Thus, this line of argument of the plaintiff is similarly without merit. As things stood at the hearing, the law considers the decision of the Federal Court allowing the appeal to be valid and binding on the court. This is settled law. At the same time, the court, more so a winding up court, cannot go behind a valid judgment of the court, except in cases of fraud or illegality, which was not the contention of the plaintiff.

[40] Thus in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155, Steve Shim J (later CJ (Sabah and Sarawak)) ruled pertinently as follows:

> It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc.

[41] That the same principle applies to winding up proceedings is not in dispute, and perhaps could not have been expressed more clearly than by Abdul Malik Ishak JCA, who, in the Court of Appeal case of *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34; [2010] 8 CLJ 775 (where a petitioner premised its winding up notice on a court order), instructively held:

> It is legally impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding up proceedings. If high authority is required for this simple proposition, the case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 (SC) a decision of Lee Hun Hoe CJ (Borneo) should be referred to. There at p 305, His Lordship had this to say:
>
> > In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge

cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton* (1893) 10 Mor 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings.

[42] The plaintiff also refers to the case of *Multimedia Development Corp Sdn Bhd v Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653, where the High Court granted an order for a Fortuna injunction in favour of the plaintiff on amongst others, the ground, according to the plaintiff, that there was an appeal pending. It was thus held:

[38] The foregoing sequence of events showed that the s 218 notice was issued by Purcon as a means to execute the summary judgment. It was the contention of Purcon that there was a debt due and payable by MDC to Purcon because of the summary judgment. But Purcon cannot solely rely on the fact that it had obtained a summary judgment to prove that there was a debt due and payable for the purpose of s 218 of the Companies Act 1965. There was an appeal pending and the debt was bona fide disputed and, flowing from all these, it can be said that the intended winding up petition by Purcon was an abuse of the process of the court.

[43] The decision in *Pembinaan Furcon* seems to suggest that notwithstanding the presence of a judgment debt, the court could still find that the debt is bona fide disputed and that an appeal against the judgment debt could assist in an application for a Fortuna injunction.

[44] In my view however, reliance on *Pembinaan Purcon* does not truly assist the position taken by the plaintiff. For this reason. The petition in that case was restrained by a Fortuna injunction because the debt claimed in that case had been determined to be bona fide disputed even though it was a judgment debt. The court also found there was abuse of process. It is true that there was an appeal pending in that case. But what was not clearly highlighted by the plaintiff herein is that there was also in *Pembinaan Purcon* a stay order against the execution of the judgment debt.

[45] Thus Abdul Malik Ishak J (as he then was) in that case stated:

[23] In my considered view, *it is certainly an abuse of the process of the court to petition MDC upon the basis of a debt which was bona fide disputed. Purcon was exerting undue pressure on MDC. The s 218 notice was based upon a judgment debt obtained by Purcon in a related Shah Alam High Court suit where Purcon was the plaintiff. The judgment was for an unsecured debt and MDC had filed an appeal to the judge in chambers and the appeal was still pending. Meantime MDC had applied and obtained a stay of execution of the said judgment in the Shah Alam High Court*. Now, the events leading up to the service of the s 218 notice clearly showed that Purcon was only interested to ulitise the proceedings of the Companies Court to exert undue pressure. This was

quite evident as there was never any attempt by Purcon to request for the payment of the judgment sum. After the judgment was sealed by the Shah Alam High Court and the service of a copy of the judgment was effected via a letter from Messrs Vincent Lim & Partners dated 24 December 2003, the next thing that followed was the s 218 notice via the same solicitors' letter dated 24 December 2003 addressed to MSC Management Services Sdn Bhd — a fully owned affiliate of MDC.

[46] Thus, in my view *Pembinaan Purcon* can be distinguished and explained on account of the fact that the judgment debt in that case was subject not only to an appeal but more relevantly also a stay of execution order, which on the authorities such as *Sanjung Suria* means that the judgment debt in that case could not be said to be undisputed.

Merits not relevant

[47] Even if one were to consider the merits of the review application (which for the avoidance of doubt should be entirely irrelevant for purposes of application for Fortuna injunction), it would be readily seen that the same is in any event short on substance.

[48] And I say this for two principal reasons. First, a careful review of the plaintiff's affidavit in support affirmed by one Loh Hock Chiang on 2 July 2018, particularly in exh LKH12 containing the notice of motion for clarification would readily reveal that the same argument about an alleged breach of natural justice (intended to be raised by the plaintiff in the impending review application) had already been included in the notice of motion for clarification which was heard before the Federal Court earlier.

[49] Yet, despite the same issue having been raised before the Federal Court in the earlier clarification motion, the same deponent in affirming the affidavit in support on 2 July 2018 for the review application averred that the Federal Court had allowed that counterclaim without the parties addressing any arguments on the merits of the counterclaim.

[50] Secondly, the assertion that the Federal Court did not hear submissions from parties on the first defendant's counterclaim is in any event erroneous for the issues on the counterclaim were clearly relevant to those in the plaintiff's claim. All must thus have been taken into account in the evaluation by the Federal Court. The Federal Court found that the plaintiff had breached its contractual obligations such that there was a total failure of consideration, thus entitling the first defendant to the remedy of the repayment of the RM20,833,053 as prayed for in its counterclaim.

[51] The argument of the plaintiff implied that the claim and the counterclaim were unrelated. This is patently untrue. There is absolutely no legitimate basis for the plaintiff to submit that parties had not addressed the Federal Court on the merits of the first defendant's counterclaim.

[52] Nor is the complaint of the plaintiff about the collection of equipment tenable. In the first place, there is no order that compels the first defendant to return to the plaintiff all equipment that had been supplied by the plaintiff to the first defendant. In fact the defendants never deny that there were other equipment belonging to the plaintiff that were in the first defendant's possession. And the defendants even permitted the plaintiff to collect those other equipment.

[53] The point is the plaintiff did not contend in any of its averments that the defendants are under any obligation to return any equipment to the plaintiff. Neither did the plaintiff aver that its purported resulting claim against the first defendant would be sufficient to reduce its indebtedness to the first defendant from RM22,198,331.43 to an amount below RM10,000. Not only that. The plaintiff did not also make any averment that it actually intended to initiate such a claim against the first defendant.

[54] Thus, the argument of the plaintiff that the plaintiff is entitled to set off the value of the missing and non-functioning items from the sum claimed by the defendants cannot hold water. The plaintiff cannot just make the assertions without more, and without having them grounded in averments in the affidavits in support.

[55] The plaintiff made much of the fact that the High Court in *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247 had taken into account the assertions of the right of set off raised by the plaintiff therein in granting a Fortuna injunction.

[56] But as I have mentioned earlier, in *Bakti Dinamik* there was no judgment debt, unlike in the instant case. This makes a considerable and crucial difference. It would not be remiss of me to reproduce the pertinent parts of my judgment in *Bakti Dinamik* to give further clarity on this point, as follows:

> [57] In *Zalam Corporation Sdn Bhd v Dolomite Ready-mixed Concrete Sdn Bhd* [2011] 9 CLJ 705, a case not referred to by the parties before me, the Court of Appeal decided on the following key findings, as expressed in the judgment of Sulaiman Daud JCA:
>
> (1) *The statutory notice which was presented to the plaintiff was based on a final judgment and the application for stay of execution was dismissed*. Moreover,

there existed a judgment debt which was supposed to be paid by the plaintiff to the first defendant. *The existence of any counter claim which was in dispute and yet to be decided could not be accepted as an excuse for the plaintiff's refusal to comply with the said statutory claim.*

(2) The case of *Pontian United Theatre Sdn Bhd v Southern Finance Berhad* which was referred by the plaintiff's counsel had not directed a legal proposition that the existence of a counter claim or cross claim could be made as an excuse to restrain a particular creditor from presenting a winding up petition. In that case, the winding up petition had already been filed and one of the issue before the court was whether the existence of a counter claim for the sum exceeding the amount claimed through a winding up petition could be used as a basis to dismiss the said petition. It had no connection with an application to restrain the presentation of a petition.

(3) A petition to wind up a company based on a valid judgment was not an abuse of court process. Though there was evidence to show that the plaintiff had issued the judgment debt sum to its solicitors, it did not remove the plaintiff from the definition of 'persons unable to pay its debts' under s 218(2)(a) of the Act. The amount owed was more than RM500 and the plaintiff neglected to pay the judgment debt which was claimed within the time fixed under the said section. *Besides, the issue in relation to solvency of a debtor was not supposed to be weighed at the stage of an injunction application* (*Mann and Another v Goldstein and Another*; refd).

(4) The honourable judge had overlooked that the plaintiff had not satisfied the first defendant's statutory claim which was based on a valid judgement whereby the execution of it was not stayed. The said petition was for a valid reason to insist on payment of a valid judgment debt and was not for other collateral reasons. *It was appropriate to decide on the issue of the plaintiff's solvency in the winding up proceeding itself because it was a defence which could be used in such a proceeding*. Furthermore, there was nothing in the plaintiff's affidavit which showed that it would incur any loss which was difficult to be restored if the first defendant was allowed to proceed with the winding up petition. (Emphasis added.)

[58] The assertion of the existence of cross-claims was not accepted in *Zalam Corporation*, but importantly, in that case, the defendant already had secured a judgment debt, which formed the basis of its winding up notice. In the instant case, like in *Hasjuara*, there is no judgment debt. It is also worthy of mention that in *Josu Engineering*, the cross-claim even defeated the statutory right of a judgment creditor to present a petition, but it must be appreciated that in that case, the cross-claim itself was in the nature of an interlocutory judgment. It is apposite that I now set out a passage from the judgment of Mary Lim J (as she then was) in *Josu Engineering* which highlights the key and relevant conclusion:

> [49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s 218 notice should also be made in

> the winding up court. Otherwise, the only viable option is to pay up. Secondly, where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail.
>
> [59] Thus, an allegation of the existence of a cross-claim may be raised before the hearing of the petition, but earlier at the injunction stage, and may even succeed if shown to be genuine and based on substantial grounds, despite the debt owed to the defendant being undisputed, such as when it is in accordance with a judgment debt. Here in the instant case, as said more than once earlier, there is no judgment debt, and the debt claimed by the defendant's s 218 notice is thus disputed. It was also held that such injunction was allowed to prevent irreparable damage to the plaintiff in that case ...

[57] Reliance on *Bakti Dinamik* does not therefore advance the case of the plaintiff.

[58] As such, the absence of the plaintiff actually commencing any such claim of set off aside, neither has the plaintiff actually evinced an intention to do so under oath. The assertions of the plaintiff's concerning collection of equipment are at best irrelevant if not wholly bereft of basis. This is nowhere close to any form of a bona fide dispute over the debt being claimed by the defendants.

Res judicata

[59] In addition to the rule against the winding up court going behind the judgment granted in the civil court as stated earlier, and that it would be inappropriate for the merits of the motion for review be examined in this application, it is also manifestly clear that the underlying facts of the civil suit between the parties pertaining to the contract and the question of whether either of the parties had infringed the same, have all been fully ventilated, adjudicated and determined by the Federal Court, ultimately in favour of the defendants.

[60] I cannot but entirely agree with the defendants that any further attempt by the plaintiff to raise these same facts and issues before me would be caught by the principle of res judicata. Res judicata would prevent a further re-agitation of the same exact issue. Indeed, the concept of res judicata is not confined only to issues that have actually been judicially determined previously.

[61] The law would also not permit issues which could have been raised in and properly belonged to an earlier proceeding to be surfaced for litigation in a subsequent suit. This is the wider doctrine of res judicata.

[62] In *Malpac Holdings Bhd v Malpac Capital Sdn Bhd & Ors* [2017] MLJU 1257; [2017] 1 LNS 1251, I had briefly stated the law on the point, as follows:

> The Wide Doctrine of Res Judicata
>
> [134] The issues raised by the plaintiff cannot succeed because they are plainly barred by res judicata. For it is fairly well settled in local jurisprudence that the principle of res judicata is even of wider remit, and extends to matters which are part of the subject matter of a litigation which ought to have been raised even if not actually raised to be determined, due either to inadvertence or by conscious design. In this case, it had in fact been raised and adjudicated upon.
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> [135] The Supreme Court made it clear in *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1 LNS 504 that there are two kinds of estoppel *per rem judicatum*, namely cause of action estoppel and issue estoppel. The scope of the plea of res judicata was clarified in the following terms:
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> [1] The significance of res judicata lies in its effect of creating an estoppel *per rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.
>
> [2] The doctrine of res judicata is not confined to causes of action or issues which the court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.
>
> [136] The Supreme Court referred to and applied the following common law principles in its exposition of the scope of the doctrine of res judicata. First, the passage by Wigram VC in the case of *Henderson v Henderson* [1843] 3 Hare 100 at p 115 which reads:
>
> > The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the same subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[137] In addition, the meaning of the words in the said above statement, namely 'every point which properly belonged to the subject of litigation' was explained by Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[138] There are a number of other local cases which have since followed this principle (see *Huawei Tech Investment Co Ltd v Transition Systems (M) Sdn Bhd* [2013] 5 MLJ 396; [2013] 1 LNS 329 and *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 CLJ 534). I therefore hold that the issues on transfer of additional shares in RRSB and the alleged need for approval under s 132C(1A) of the CA raised, yet again, herein are so manifestly res judicata and surely thus cannot be further pursued.

[63] But it is crystal clear in this instant application before me that res judicata would be in relation to the very issue of dispute between the parties — on the arguments pertaining to the counterclaim — which had been raised before in the motion for clarification, and now repeated in the motion for review. There is no necessity to rely the wider sense of res judicata as referred to by the leading Federal Court decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189.

[64] The law will not permit the issue of arguments on counterclaim to be re-opened and re-litigated by the plaintiff in the review application at the Federal Court when the same had been raised in the plaintiff's own affidavit in support in the preceding motion for clarification at the Federal Court. Res judicata will step in to prevent a further re-agitation of the same complaints which had been raised before the apex court, which is now attempted to be raised by the plaintiff in its conduct of litigation in instalments.

Irreparable damage argument irrelevant

[65] The plaintiff also argues that it is a company with long established good will and reputation, and is a wholly owned subsidiary of Comintel Corporation Bhd, which is a company listed on the local stock exchange. The concern apparently is that the presentation of a winding up petition against the plaintiff will have an adverse impact on the plaintiff's holding company and the latter's group of companies.

[66] The plaintiff is suggesting that the presentation of a winding up petition would cause it irreparable damage. But as I have explained, the governing law is, as established by authorities such as the Court of Appeal decision in

A *Muniammah Muniandy* that once it is shown that there is no bona fide dispute over the debt in question — and it is invariably so when there is judgment on the said debt — an applicant for a Fortuna injunction cannot but fail to have the presentation of the petition restrained. Neither of the two categories could be invoked if the debt is not bona fide disputed.

B

[67] At the risk of repetition I state that under the first category, the plaintiff must show both that the intended winding up petition is not capable of success and that is may cause irreparable damage. As the winding up petition cannot be said to be incapable of success given the judgment over the debt, the issue on irreparable damage becomes irrelevant.

C

[68] Similarly, under the second category, the proper determination of the matter that ought to be determined in a different, more suitable alternative procedure forum because the winding up court procedure might produce irreparable damage to the company, is only applicable if the matter is disputed. If there is a judgment debt like in the instant case, there is really no dispute.

D

[69] The plaintiff's riposte to the defendants' argument that there is no evidence that the plaintiff is financially solvent is that the issue of whether the plaintiff has immediate available assets to pay the sum claimed in the statutory demand is not a relevant consideration in the present application. The plaintiff is only required to establish that there is bona fide dispute against the defendants' claim in the statutory demand.

E

F

[70] This is undoubtedly accurate. But of more crucial importance neither has the debt been shown to be bona fide disputed. And in any event, it is now settled law that the issue on the inability to pay debt is to be considered in the commercial context, which is the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realised would permit it to discharge its liabilities.

G

[71] The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due (see *System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] MLJU 55; [1999] 1 AMR 1187).

H

[72] This is the reason why it has been said that a company could be both insolvent but wealthy at the same time (see, for example, the Privy Council decision in *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 and the Supreme Court decision in *Sri Hartamas Development Sdn Bhd v Mbf Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 637).

I

[73] It is absolutely insufficient to argue that the assets might be realisable at some future date after the debts have become due and payable (see the Supreme Court decision in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 and the Court of Appeal decision in *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817).

[74] It is entirely inconsequential for an applicant for Fortuna injunction to claim to own assets or to assert that he could recover damages in the future. The crucial point is that the applicant must at present have the ability to pay the amount claimed by the defendant to be due and owing to the defendant, and manifestly falls within the definition of 'unable to pay its debt' pursuant to s 466 of the CA.

[75] For the same reason, it is insufficient for a debtor company to assert that it has other assets locked up elsewhere which can sufficiently meet its liabilities. The test of commercial solvency requires immediate availability of assets to pay current liabilities when they fall due. I also had the occasion to state this important principle in *Aeon Big (M) Sdn Bhd v SSM Management Sdn Bhd* [2017] MLJU 1824; [2017] 8 AMR 732 as follows:

> [45] In the first place it is trite law that even though a company may possess of wealth in the form of investments not presently realisable, if the company has no assets available to meet its current liabilities, the company is legally commercially insolvent and may be wound up (see the Supreme Court decision in *Sri Hartamas Dvpt Sdn Bhd v MBF Finance Bhd* [1992] 1 CLJ Rep 303). The test of solvency is one of cash flow solvency, not balance sheet solvency.

[76] Nor can the plaintiff legitimately contend that it is solvent (which it is not shown, as stated earlier) but refuse to pay up, unless it could show that there is a bona fide dispute on the debt claimed. Again, it has been established that there is no such genuine dispute. It is not open to the plaintiff to assert that it is able to pay the debt but chooses not to at the same time.

[77] As I have observed in *Kris Heavy Engineering & Construction Sdn Bhd v Lewis & Co (Advocates & Solicitors)* [2017] MLJU 906; [2017] 5 AMR 866, a case cited by the defendants, the solvency of a company would count for nothing if it persists in non-payment or that it is nevertheless not ready, willing and able to meet the demand of the petitioning creditor.

[78] In the instant case, the plaintiff did not even furnish any audited financial statements nor is there any basis to show whether the plaintiff has immediate availability of assets to pay the statutory demand.

[79] For completeness, I should add that in respect of the issue of the

concern on the risk of injurious repercussions of a presentation of a winding up petition to the plaintiff company, it is apposite for me to reproduce the often quoted passages from the judgment of the Court of Appeal in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380 relevant to the point, which was also referred to by the Court of Appeal in *Muniammah Muniandy,* as follows:

> It must be remembered that the judgement is a money judgment. There is not even an allegation, what more evidence that the respondent is not in a financial position to repay the applicant if it need be.
>
> The grounds relied on by the appellant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgement debt.

[80] As such, in order to prevent the alleged consequence of irreparable damage, all the plaintiff need to do is to settle the judgment debt. Indeed in *Bakti Dinamik*, I had also stated as follows:

> [59] ... However, in *Pacific & Orient Insurance*, the Court of Appeal was clear in stating that the question of whether there was irreparable damage was wholly irrelevant when there is a judgment debt, as a petition would thus be bound to fail. Any fears of damage should be avoided by settling the judgment debt (see the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380). In any event, again, in the instant case, there is no judgment debt.

[81] Similarly in this case before me, the plaintiff did not aver that if payment of monetary judgment debt is made to the defendants, the latter would not be in a position to make repayment should the motion for review somehow result in the order reversing the earlier decision of the Federal Court.

CONCLUSION

[82] In view of the foregoing reasons, primarily on the absence of any bona fide dispute in respect of the debt demanded in the winding up notice, such that an intended petition by the defendants would not be bound to fail, the application of the plaintiff to restrain the filing of a winding up petition by the defendants cannot be sustained.

[83] There is as such a manifest absence of any legitimate basis to deny the right of the defendants under the statute to proceed with a winding up petition against the plaintiff upon the non-payment of the statutory demand under s 465(1)(e) after 21 days, and much less to even suggest that the defendants are abusing the legal process.

[84] As such I dismiss the originating summons of the plaintiff in encl 1 with costs. **A**

Originating summons dismissed with costs.

Reported by Addibah Adnan **B**

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